IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1740 OF 2007

Pandurang Dattatraya Palkar & Ors.. Petitioners
Versus
Vasant Dattatraya Palkar & Anr. .. Respondents

Mr.Rupesh Bobde i/b. Umesh Mankapure for petitioners

CORAM : S.C.DHARMADHIKARI, J.

DATE : 19th November 2007

P.C.

. Notice was directed to be issued on this petition by this Court on 25th July 2007 and the notice has been served.

2. Office report shows that despite service none is appearing for original plaintiff-respondent No.1 and the defendant No.2 -

respondent No.2.

3. Original plaintiff - respondent No.1 filed a Regular Civil Suit being Suit No.148 of 1988 in the Court of Civil Judge, Junior Division Vita for partition and separate possession.

4. The grievance of the present petitioner is that all the properties of the family have not been included in the suit and more particularly Gram Panchayat house No.49 which is joint family property. It is the grievance of the petitioner that although their predecessors in title were served and written statement was on record, on account of negligence of the Advocate who was engaged by them so also death of predecessor in title, the matter could not be attended and consequently, ex parte decree and judgement was delivered on 3rd July 1998 in the said suit.

5. After receiving the certified copies on

3rd July 1999 an appeal was preferred in the year 1999 itself and since there was a delay, Misc.Civil Application No.106 of 1999 was preferred seeking condonation of delay.

6. That application has been rejected by the impugned order after more than six years of the same having been filed and remaining pending. It is rather unfortunate that the Dist.Judge Sangli lost sight of the principles which are indeed elementary in deciding such application and has observed in para 6 as under:-

> "6. The record and proceeding was called. The present applicants have admitted that the suit property is ancestral and joint family property. When a suit is filed for the relief of partition, such delaying tactics are generally played by the person who is in possession of the property. It appears

that the applicants have entered their names in the assessment record and they want to protract giving of the possession. The defence taken by the applicants that there is one more house and that needs to be included in the suit is considered by the trial court and in respect of that property the gift deed, which is 30 years old executed in favour of the plaintiff by his father. The trial court has held that the property gifted to plaintiff was self-acquired property of the deceased. It appears that other properties of the deceased were disposed of during life-time of the deceased father of plaintiff. Thus, there was no scope for the defendant No.1 to defend the matter. In view of these circumstances, I hold that the delay of about one year does not deserve to be condoned. The circumstances that the

> applicants did not take prompt steps in the proceeding also to serve the non-applicants needs to be kept in mind. I have no hesitation to observe that the applicants are playing delaying tactics to protract execution of the partition decree. So I pass the following order:- The application stands rejected."

7. In my view, such general observations and remarks need to be avoided and the Courts must decide the matter on the basis of the facts brought to their notice. It is not as if the delay has to be condoned automatically and straight away. Similarly, by applying general principles, applications for condonation of delay should not be rejected either. Each case depends upon its own facts and discretion has to be exercised judicially considering the same.

8. In the entire order the learned Judge

does not observe that no sufficient cause is made out. On the other hand only reasons assigned for rejecting the application are to be found in the above reproduced para.

9. In para 5 the learned Judge has observed that there is no record to show that the Advocate appearing for present petitioners had intimated to them of the dates. Upon death of the predecessors of petitioners, it is true that the present petitioners were impleaded and appeared and adopted the earlier written statement. The learned Judge was aware that applicant No.1B is mentally retarded person. Further, merely because others could have remained present does not mean that the version has to be disbelieved straight away. In the affidavit in support of the application for condonation of delay, the petitioners have pointed out that they are labourers who are earning their livelihood by working on daily wage basis. Applicant Nos. 1A

was an old lady. All of them including applicant Nos. 1A and 1B are not in a position to comprehend the proceedings in court being wholly illiterate. Attending applicants were required to go out of village for earning their livelihood. Their ignorance has been pointed out. They have also pointed out that that they are poor and could not arrange for the funds. It is not as if there is some enormous and unexplained delay. The application for condonation of delay itself was pending in the Lower Appellate Court for more than six years. The learned Judge would have been well advised to take up the appeal itself instead of wasting Court’s precious time in considering an application for condonation of delay of some days or months. Nobody is present before me on behalf of the contesting respondent No.1 - original plaintiff. He does not appear to have even contested the application before the Court below. In such circumstances, in the peculiar facts of

this case, interest of justice would be sub-served if the order under challenge is set aside and the delay is condoned.

10. Accordingly, Misc.Civil Application No.106 of 1999 is allowed. The appeal preferred by the present petitioners would now be heard, as expeditiously as possible, on merits and in accordance with law. Petitioners to appear before the lower appellate court on 26th November 2007. Lower Appellate Court to then take up the appeal on merits and decide the same as expeditiously as possible. All contentions of both sides are expressly kept open.

11. Rule is made absolute accordingly. However, petitioners to pay costs quantified at Rs.750/-. Costs condition precedent and to be deposited in lower appellate court on or before 26th November 2007. On such deposit original plaintiff is allowed to withdraw the same.

(S.C.Dharmadhikari, J)